IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION, et al.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	No. 12-CV-493-GKF-TLW
	)	
KENNETH L. SALAZAR, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

AUGUST 12, 2013

REPORTED BY: ***BRIAN P. NEIL, RMR-CRR***
United States Court Reporter

A P P E A R A N C E S

Amelia A. Fogleman and David E. Keglovits, attorneys at law, Gable & Gotwals, 100 West 5th Street, Suite 1100, Tulsa, Oklahoma, 74103, attorneys on behalf of the Plaintiff Cherokee Nation Entertainment,LLC;

Stephen D. Dodd and William D. McCullough, Jr., attorneys at law, Doerner, Saunders, Daniel & Anderson, Two West Second Street, Suite 700, Tulsa, Oklahoma, 74103, attorneys on behalf of the Plaintiff Cherokee Nation;

Todd Hembree, Attorney General, Cherokee Nation, 17675 South Muskogee Avenue, Tahlequah, Oklahoma, 74465, attorney on behalf of the Plaintiff Cherokee Nation;

Jody H. Schwarz, attorney, U.S. Department of Justice, 601 D Street N.W., Washington, D.C., 20004, attorney on behalf of the Defendants Salazar and Black;

Christina M. Vaughn and James C. McMillin, attorneys at law, McAfee & Taft, 1717 South Boulder, Suite 900, Tulsa, Oklahoma, 74119, attorneys on behalf of the Intervenor Defendant UKB.

Monday, August 12, 2013

* * * * *

DEPUTY COURT CLERK: We're here in the matter of the Cherokee Nation, et al., v. Kenneth L. Salazar, et al., Case No. 12-CV-493-GKF. Will the parties please enter their appearance?

MR. MCCULLOUGH: David McCullough for Cherokee Nation.

MR. DODD: Doug Dodd for Cherokee Nation.

MR. HEMBREE: Todd Hembree, Attorney General for the Cherokee Nation.

MR. KEGLOVITS: David Keglovits on behalf of the Cherokee Nation Entertainment, LLC.

MS. FOGLEMAN: Amelia Fogleman on behalf of Cherokee Nation Entertainment.

MR. MCMILLIN: Jim McMillin on behalf of the United Keetoowah Band of Cherokee Indians in Oklahoma.

MS. VAUGHN: Christina Vaughn, Attorney General for the United Keetoowah Band of Cherokee Indians in Oklahoma.

THE COURT: And on the telephone?

MS. SCHWARZ: It's Jody Schwarz for the Department of Justice. Also present with me are Barbara Marvin, Maureen Rudolph, and Ed Passarelli Of

the Justice Department and also Bethany Sullivan of the Department of the Interior.

THE COURT: Good afternoon. Let me confer with my law clerk here very briefly.

(Discussion held off the record)

THE COURT: Before the court is the amended motion for preliminary injunction at docket No. 84 filed by the plaintiffs, Cherokee Nation and Cherokee Nation Entertainment, LLC. The plaintiffs seek an order enjoining defendants Kenneth L. Salazar, as secretary of the Department of Interior, and Michael S. Black, acting assistant secretary for Indian Affairs, pending resolution of this action on the merits, from transferring into trust on behalf of the United Keetoowah Band Corporation -- UKB Corporation referred to by this court for the purposes of this speaking order -- for gaming purposes, a 2.03-acre tract of land located in Cherokee County, Oklahoma, to which the parties refer as the "gaming tract," which lies within the Cherokee Nation's historical treaty territory.

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. The court references *University of Texas v. Camenisch*,

C-a-m-e-n-i-s-c-h, 451 U.S. 390, 395, a 1981 Supreme Court decision.

To obtain a preliminary injunction, a plaintiff must show, one, a likelihood of success on the merits; two, a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; three, that the balance of equities tips in the movant's favor; and four, that the injunction is the in the public's interest. The court cites *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011). In deciding this motion, the court has considered each of these four factors.

First, as to success on the merits, this court's review of the July 30th, 2012, decision by the assistant secretary granting the UKB's application to take the gaming tract into trust is governed by the Administrative Procedure Act, the APA, Title 5, United States Code Section 706.

Agency action is arbitrary and capricious under Section 706 if the agency, No. 1, entirely failed to consider an important aspect of the problem; No. 2, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise;

No. 3, failed to base its decision on consideration of the relevant factors; or No. 4, made a clear error of judgment. And the court cites *Hillsdale Environmental Loss Prevention, Inc. v. United States Army Corps of Engineers*, 702 F.3d 1156, 1165 (10th Cir. 2012).

In determining whether an agency action was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, the critical question is whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *City of Colorado Springs v. Solis*, 589 F.3d 1121, 1131, (10th Cir. 2009).

The APA standard encompasses a presumption in favor of the validity of agency action and thus, the ultimate standard of review is narrow one. The court is not empowered to substitute its judgment for that of the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); and *City of Colorado Springs*, 589 F.3d at 1131. The court is mindful that it should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, pages 513-14 (2009).

In his evaluation of the UKB's application to

take the gaming tract into trust, the assistant secretary had to determine whether he had any basis to take the land into trust.

Section 5 of the Indian Reorganization Act, the IRA, at 25 United States Code Section 465, allows the Secretary of the Interior to acquire lands in trust for Indians. In 2009, the United States Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009), held that the Department of Interior cannot accept land into trust under Section 5 of the IRA for any tribe that was not "under federal jurisdiction" when the IRA was enacted in 1934. Obviously, this is an obstacle for tribes that were federally recognized after 1934. I mention this because the *Carcieri* decision has ramifications for the UKB, which was not organized until 1950.

One of the issues the assistant secretary had to decide in evaluating whether to take the gaming tract into trust was whether gaming on the tract would be legal under the Indian Gaming Regulator Act, or IGRA. IGRA prohibits gaming on Indian lands accepted by the secretary into trust for the benefit of an Indian tribe after October 17, 1988, unless the lands fall within certain statutory exceptions. In the July 30, 2012, decision, the assistant secretary determined

that gaming on the tract would be permissible under one of those exceptions, 25 United States Code Section 2719(a)(2)(A)(i), which permits gaming on lands acquired by the secretary into trust for the benefit of a tribe after October 17, 1988, if the land is located in Oklahoma within the boundaries of the Indian tribe's former reservation as defined by the secretary.

In reaching this conclusion, the secretary determined that the -- the assistant secretary determined -- excuse me -- that the term "former reservation" was ambiguous as applied to the facts at hand. He noted that the applicable regulation at 25 C.F.R. Section 292.2 defines a "former reservation" to mean lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, executive order, or secretarial order for an Oklahoma tribe. He stated that neither IGRA nor the regulation addressed the question of whether two federally recognized tribes, one of which was formed under express congressional authorization from the citizens of the other, can share the same former reservation for purposes of qualifying for IGRA's former reservation exception. And he stated that under the expression language of IGRA, the

determination was one that he was entitled to make. He found that for purposes of IGRA, the former reservation of the Cherokee Nation is also the former reservation of the UKB, and concluded on that basis that gaming could take place on the gaming tract.

Under 25 C.F.R. Section 151.10, the assistant secretary also had to determine whether there was statutory authority for the acquisition. He concluded that the statutory authority for this acquisition was Section 3 of the Oklahoma Indian Welfare Act, Title 25 United States Code Section 503. Section 3 of the act allows recognized tribes or bands of Indians residing in Oklahoma to, among other things, obtain from the Department of Interior charters of incorporation, and it provides that such chartered corporations are entitled to enjoy "any rights or privileges secured to the organized Indian tribe under the act of June 18, 1934."

The assistant secretary found this statute implicitly authorizes the secretary to take land into trust for the UKB Corporation. In support of this finding, he cited a series of decisions made in a separate application by the UKB to the Department of Interior to take the 76-acre community services parcel into trust. In those decisions, the assistant

secretary requested additional briefing on the impact of *Carcieri* and offered the UKB three options to secure the benefit of trust ownership, one of which was to have the secretary take the land in trust for the UKB Corporation as opposed to the UKB tribe. Ultimately, in the 76-acre tract matter, he determined land could be taken into trust for the UKB Corporation under Section 3 of the Oklahoma Indian Welfare Act.

A third issue the assistant secretary had to address was whether the consent of the Cherokee Nation would be required in order to take the land into trust for the UKB Corporation. Under 25 C.F.R. Section 151.8, if the land at issue is on a reservation other than its own, then the consent of the tribe having jurisdiction over the reservation must be obtained. The assistant secretary acknowledged that in the past, consistent with this regulation, the department had declined to take any lands into trust for the UKB within the boundaries of the former Cherokee reservation without the consent of the Cherokee Nation. But he concluded "now that we have determined the former reservation of the Cherokee Nation is also the former reservation of the UKB for purposes of applying the IGRA exception, the Cherokee Nation's consent was no longer required."

The plaintiffs attack the 2012 decision on three bases. First, they argue that the 2012 decision relies on unprecedented and legally unsupported rationales advanced for the first time in the history of trust application approval. Second, they contend the assistant secretary's conclusion that the Oklahoma Indian Welfare Act authorizes a trust application for the UKB Corporation is contrary to law. And third, they argue that the assistant secretary's conclusion that the Cherokee Nation's former reservation is shared by the UKB is contrary to law.

The assistant secretary's determination that he could rely on Section 3 of the OIWA to acquire land in trust for the UKB is unprecedented, other than with respect to the 76-acre tract decision that is now on appeal with the Interior Board of Indian Appeals. These two decisions are the first to find authority to acquire land in trust pursuant to Section 3 of the OIWA. They mark the first trust acquisitions approved for a tribal corporation of a tribe first recognized after 1934. This decision is also the first time the department has recognized a tribe and a band as having the same former reservation for purposes of qualifying for the exception in IGRA for acquiring land in trust after 1988.

To be sure, and as the department argues, the fact that the determination is unprecedented does not necessarily mean its arbitrary and capricious. However, when an agency departs from prior interpretation of a statute it is charged with implementing, the agency must justify the change of interpretation with a reasoned analysis. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1306, (10th Cir. 1999), quoting *Motor Vehicle Manufacturers Association* 264 U.S. at 42.

In this case, the assistant secretary failed to adequately explain his reasoning or to reconcile his decision with prior inconsistent holdings by the Department of Interior itself and by courts and with Interior's own regulations. Therefore, the court concludes the decision is arbitrary and capricious.

Bear in mind this is not a final holding, but I am concluding this for purposes of deciding the likelihood of success on the merits and obviously it's not a final decision of this court.

The assistant secretary's finding that Section 3 of the OIWA implicitly authorizes a trust acquisition for a federal chartered tribal corporation appears to be clearly erroneous and contrary to law. Section 3 of the OIWA provides that tribes may form tribal

corporations and that the charters approved by the secretary may convey to the incorporated group and any other rights or privileges secured to an organized Indian tribe under the IRA. Thus, it merely grants tribal corporations the same rights as the tribes themselves, not greater rights. Because *Carcieri* made it clear that the UKB has no right to have the land taken into trust under Section 5 of the IRA, Section 3 of the Oklahoma Indian Welfare Act cannot create such a right for the benefit of the UKB Corporation and the decision is contrary to the Department of Interior's own regulations. 25 C.F.R. Section 151.3 permits the assistant secretary to acquire land in trust only for "an individual Indian or a tribe." That's 25 C.F.R. Section 151.2(b). Section 151.2(b) authorizes tribal corporations to be considered tribes under limited circumstances where there is a statute that "specifically" authorizes trust acquisitions for such corporations. However, the assistant secretary found only implicit authority to take the land into trust for the UKB Corporation. In short, the UKB Corporation does not meet the definition of tribe in Section 151.2(b). Thus, the law and implementing regulations do not permit the assistant secretary to take land into trust for the UKB Corporation.

The assistant secretary's determination that the Cherokee Nation's "former reservation" is also the former reservation of the UKB under IGRA is arbitrary and capricious in light of the regulation's definition of the term in 25 C.F.R. Section 292.2. The determination is so implausible it cannot be ascribed to a difference in view or the product of agency expertise. The UKB has no last reservation established by a treaty, by an executive order, or by a secretarial order. The administrative agency's decision appears to have ignored the Department of Interior's own previous decisions, case law, and the legal history of the Cherokee Nation, including its treaty rights.

Finally, the assistant secretary appears to have erred in applying the Indian canon of construction that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." This canon is inapplicable in cases such as this, where an Indian tribe and a band of Indians are on different sides of an issue and construing statute in favor of one group of Indians will adversely impact another group. *Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995), and *Cherokee Nation of Oklahoma*, v. Norton, 241 F.Supp.2d 1374,

1380 (N.D. Okla. 2002).

Now, as to likelihood of irreparable harm, a plaintiff satisfies the irreparable harm requirement by demonstrating a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages. *RoDa Drilling v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Purely speculative harm will not suffice, but rather a plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative and will be held to satisfy the burden.

The court finds that the plaintiffs have demonstrated a significant risk they will suffer irreparable harm that cannot be compensated after the fact by monetary damages. First, there is no legal certainty that the department could return the gaming tract to fee status after the issuance of a trust deed to the UKB Corporation. Defendants argue that the Supreme Court's decision in *Patchak v. Salazar*, 132 S.Ct. 2199 (2012), ensures that the gaming tract can be successfully taken out of trust should the plaintiffs ultimately prevail on the merits in this case.

Both the UKB and the UKB Corporation have submitted resolutions of limited waivers of sovereign

immunity. However, the secretary is not proposing to place the land in trust for the tribe. The tribal corporation has submitted a resolution approved by only two of its members. If plaintiffs are correct, the 13 members of the UKB tribal council are the officers of the UKB Corporation. The resolution purports to establish a limited waiver of sovereign immunity to provide this court with subject matter jurisdiction over the UKB corporate authority for the purposes of equitable relief only. The UKB Corporation is not a party to this litigation, it has not waived sovereign immunity by fully submitting to the jurisdiction of this court, and the limited waiver approved by only two of the members does not appear to be a valid waiver of sovereign immunity. Thus, the UKB Corporation could assert objections and defenses to the return of the gaming tract to fee status which could delay or prevent an unwinding of the trust acquisition.

Second, the court is persuaded by Mr. Keglovits' argument that if the executive branch takes property from within the historic boundaries of the Cherokee Nation into trust for the UKB Corporation without specific authority from Congress, the executive branch's action would violate the sovereignty granted

to the Cherokee Nation by Congress. In *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, at 1250, a Tenth Circuit case from 2001, the Tenth Circuit stated "the concept of irreparable harm unfortunately does not readily lend itself to definition." It noted that irreparable harm is often suffered when the injury cannot be adequately atoned for in money or when the district court cannot remedy the injury following a final determination on the merits.

There, the tribe had instituted its own motor vehicle registration and titling procedures. In affirming the district court's order enjoining the state from continuing to enforce its registration and titling procedures with respect to the tribe and its members, the Tenth Circuit found that the thread of continuing citation by the state created the prospect of significant interference with tribal self-government.

This court concludes that violation of the Cherokee Nation's sovereignty within the bounds of the historic Cherokee Nation would constitute an unquantifiable but significant risk of irreparable harm, albeit temporary.

Third, the court finds that there is a strong

likelihood that issuance of a trust deed will cause jurisdictional conflicts between the Cherokee Nation and the UKB, including conflicts over law enforcement, as recognized by Ms. Karen Ketcher, the acting regional director of the BIA.

Finally, as the court expressed at last Friday's hearing, the alleged economic damages to plaintiffs if the UKB is allowed to continue operation are too speculative. The court's comments to Mr. Keglovits at the hearing were limited to this sole item of alleged irreparable injury.

As to balancing of harms, after determining the harm that would be suffered by the moving party if the preliminary injunction is not granted, the court must then weigh that harm against the harm to the defendant if the injunction is granted. *Crowe & Dunlevy v. Stidham*, 609 F.Supp.2d 1211, 1224 (N.D. Okla. 2009).

Critical to an evaluation of this element is a determination of what the "status quo" is. The status quo is the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing. The court quotes *Schrier*, 427 F.3d at 1260, quoting *Dominion Video Satellite, Inc. v. EchoStar Satellite Corporation*, 269 F.3d at 1155 (10th Cir. 2001). I'll eliminate the remaining citations

here.

In determining the status quo for preliminary injunctions, this court looks to the reality of the existing status and relationship between the parties and not solely to the parties' legal rights. That's *Dominion Video Satellite, Inc.*, 269 F.3d at 1155.

Plaintiffs assert the status quo is that the land is in fee status; another Indian tribe or band has never, in the more than 175 years since the Cherokee Nation acquired its reservation in Oklahoma, been authorized by Congress to exercise jurisdiction over land within the Cherokee Nation's historical jurisdictional boundaries; and that is between the Nation, the Department of Interior and the UKB Corporation, the Cherokee Nation is the only Indian tribe exercising governmental jurisdiction over trust lands within its historical boundaries.

The secretary and the UKB argue that the status quo is that, legally or illegally, the casino has operated since 1986, and the injunction sought by the plaintiffs would "upset the status quo between the parties by prohibiting the UKB's right to operate its gaming facility at great harm to many other parties."

However, as plaintiffs point out, whether the UKB can or cannot conduct gaming activities on the

gaming tract is not an issue before this court and the UKB had its opportunity to fully litigate that issue in *UKB v. Oklahoma* in the Eastern District of Oklahoma, Case No. 04-CV-340. Originally, the UKB and the state had entered into an agreement for a one-year grace period until July 30, 2013, before the state would enforce its gaming laws. It became clear by May or June of 2013 that the gaming tract would not be taken into trust by July 30, 2013. Rather than seek an injunction or extension in the Eastern District case and litigate its position against the state, the UKB instead negotiated with the state for a one-time extension of the agreed closure date from July 30, 2013, to August 30, 2013.

On July 29, 2013, the UKB and the state filed a joint application to modify the July 10, 2012, agreed order in the Eastern District case. In the joint application, the UKB agreed that the order extending the closing date would be the final order entered in that case. The court entered a minute order granting the joint application the same day.

Plaintiffs accuse the defendants of attempting to manufacture a status quo in this action that involves the continuation of unlawful gaming by the UKB.

In *Dominion Video Satellite*, the court cautioned against a situation where any party opposing a preliminary injunction could create a new status quo immediately preceding the litigation merely by changing its conduct toward the adverse party. To treat such a new status quo is the relationship, which an injunction should not disturb, would unilaterally empower the party opposing the injunction to impose a heightened burden on the party seeking the injunction.

The court declines to adopt the view of the status quo urged by the UKB and the Department of Interior because that status quo was created by the UKB when it entered into its recent agreement with the State of Oklahoma in the Eastern District case. The status quo is that the land has never been in trust for the UKB and, at least for the time being, it should remain that way. Therefore, the balancing of harms weighs in favor of plaintiffs.

The injunction sought by the plaintiffs would not order a cessation of gaming or a shutdown of the UKB casino, and indeed that is not an issue in this case. However, in balancing the harms, the court is cognizant of the defendant's argument that entry of a preliminary injunction may ultimately lead to forced closure of the casino which employs hundreds of

people.

The UKB's predicament is similar to situations presented in patent infringement cases where courts have refused to consider the impact on the patent infringer of an injunction forcing it to stop selling its infringing product. In *Robert Bosch, LLC v. Pylon Manufacturing Corp.*, 659 F.3d 1142, 1156, a Federal Circuit case from 2011, the court reasoned that a party cannot escape an injunction simply because it is smaller than the patentee or because its primary product is an infringing one. And in a similar patent infringement case, *Windsurfing International, Inc. v. AMF, Inc.,* 782 F.2d 995, 1003, n.12, another Federal Circuit case from 1986, the court stated that one who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.

And here, a preliminary injunction would not destroy the UKB's desire to have the parcel taken into trust. It would merely enjoin the secretary from doing so until such time as this legal dispute has been resolved in the UKB's favor.

Plaintiffs have made a strong showing of likelihood of prevailing on the merits. The

uncertainty attendant to unwinding a trust transaction, the very real threat to the Cherokee Nation's sovereignty, and the potential for serious jurisdictional conflict are, while not financial in nature, significant factors which must be considered. Further, the conundrum in which the UKB finds itself is largely due to decisions it has made in the Eastern District of Oklahoma case where the UKB negotiated a grace period delaying the state's enforcement of its gaming laws for what was arguably an unrealistically short period of time. The court, therefore, concludes that the balancing of harms in this case tips in favor of the plaintiffs.

Now, as to the public interest, plaintiffs assert granting an injunction would serve the public interest for two reasons. First, the public interest is served when administrative agencies comply with their obligations under the Administrative Procedure Act. *North Mariana Islands v. United States*, 686 F.Supp.2d 7, 21 (D.D.C. 2009). The plaintiffs argue that the public interest cannot be served by the Department of Interior's failure to comply with the IRA, the OIWA, and IGRA.

Second, Congress has stated the purpose of IGRA was to promote tribal economic development,

self-sufficiency and strong tribal governments, and to ensure that the Indian tribe was the primary beneficiary of the gaming operations. 25 United States Code Section 2702. The plaintiffs argue that issuing an injunction would further the purposes of IGRA, which is concerned with protecting gaming as a source of Indian economic development. They contend that if the executive branch permits the UKB to operate gaming within the jurisdictional territory of the Cherokee Nation, congressional policy's undermined with respect to the second.

Therefore, plaintiffs argue that the public interest is served by maintaining the status quo, which they argue is that of the Cherokee Nation being the only tribe exercising governmental jurisdiction over trust lands within its historic boundaries. Citing the same statute, the defendants assert that the public interest is best served by promoting the economic development and self-sufficiency of the UKB.

This court concludes that congressional intent to promote tribal economic development and self-sufficiency is a neutral factor in this case because both Indian entities, the Cherokee tribe and the United Keetoowah Band, contend its own economic development should be protected.

However, because plaintiffs have shown a strong likelihood of prevailing on the merits, the public's interest in having executive agencies comply with their obligations under the APA is best served by entering the preliminary injunction staying the Department of Interior from taking the land into trust.

Now, the Tenth Circuit has identified three types of specially disfavored preliminary injunctions as to which a movant must satisfy an even heavier burden of showing that the four preliminary injunction factors weigh heavily and compellingly in movant's favor before such an injunction may be issued. First, preliminary injunctions that alter the status quo; second, mandatory preliminary injunctions; and third, preliminary injunctions that afford the movant all the relief it could recover at the conclusion of a full trial on the merits. The court cites *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975, (10th Cir. 2004) (en banc), later affirmed and remanded by the United States Supreme Court, Gonzales v. *O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006).

Any preliminary injunction fitting within one of the disfavored categories must be more closely

scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course. A party seeking such an injunction must show a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms. *Schrier v. University of Colorado,* 427 F.3d 1253, 1259 (10th Cir. 2005).

The injunction sought by the plaintiffs is prohibitory rather than mandatory in nature. Further, the court has found that the injunction sought by the plaintiffs would not alter but instead would preserve the status quo.

The UKB argues that the preliminary injunction sought by plaintiffs would afford them all the relief the plaintiffs could recover at the conclusion of a full trial on the merits, and therefore, it is a disfavored injunction. Absent some alteration of the agreed order between Oklahoma's Attorney General and the UKB in the Eastern District of Oklahoma action, it appears that a preliminary injunction in this case is likely to result in at least a temporary cessation of the UKB's competing casino operation in Tahlequah. However, a preliminary injunction will not render a trial on the merits largely or completely meaningless.

In *Prairie Band of Potawatomi Indians v. Pierce,*

253 F.3d 1234, 1237 (10th Cir. 2001), the Tenth Circuit discussed this issue at some length. It stated that the terms all the relief to which the movant would be entitled, or all the relief sought have been the source of confusion because read literally they appear to describe any injunction where the final relief for the plaintiff would simply be a continuation of the preliminary relief, and it concluded that "the only reason to disfavor a preliminary injunction that grants substantially all the relief sought is if it would render a trial on the merits largely or completely meaningless. Therefore, all the relief to which a plaintiff may be entitled must be supplemented by a further requirement that the effect of the order once complied with cannot be undone." The Tenth Circuit gave examples of preliminary relief that cannot be undone, including a case involving the live televising of an event scheduled for the day on which the preliminary relief is granted or a case involving the disclosure of confidential information.

In *Prairie Band*, a tribe sought an injunction prohibiting the state from enforcing its state motor vehicle registration and titling laws with respect to the tribe and its members. The state argued that the

relief sought would afford the tribe substantially all the relief it might recover. The court, however, held that the preliminary injunction issued by the trial court gave the tribe at most only temporary recognition, not permanent. The court stated that this interim relief quite simply was not complete.

In addition, the plaintiffs here seek not only injunctive relief, but also a declaratory judgment that the Cherokee Nation's treaty territory is not a shared reservation or a former reservation of the UKB, and that the secretary's decision to take the land into trust violates treaties between the Cherokee Nation and the United States. In that sense, the entry of a preliminary injunction prohibiting the Department of Interior from taking the gaming tract into trust for the benefit of the UKB does not afford the plaintiffs all the relief they could recover at the conclusion of a full trial on the merits.

In the alternative, should this circuit conclude that the preliminary injunction entered today alters the status quo or affords plaintiffs all the relief they could recover at the conclusion of a full trial, this court concludes that the plaintiffs have made a strong showing with regard to the likelihood of success on the merits and with regard to balancing of

the harms.

As to the bond, upon consideration of the particular facts and circumstances of this case, the court will not require plaintiffs to post a security. First, plaintiffs Cherokee Nation and Cherokee Nation Entertainment, LLC are entities with substantial assets, and they will be able to pay any costs and damages sustained by the UKB and/or the UKB Corporation in the event the Department of Interior is found to have been wrongfully enjoined or restrained. In addition, the preliminary injunction here is imposed upon the secretary and the acting assistant secretary for Indian Affairs in their official capacities, not upon the Band or the Band's corporation.

In its agreement with the State of Oklahoma in the separate action before the United States District Court in the Eastern District of Oklahoma, the UKB agreed it would be required to cease all gaming activities unless the federal government accepted the gaming tract in trust by a date certain. The UKB thus undertook the risk that the Department of the Interior might not take the gaming tract into trust by the date certain for any number of reasons, including the possibility of arbitrary and capricious action.

As to the terms of the preliminary injunction, pursuant to Title 5, United States Code Section 705 and Federal Rule of Civil Procedure 65, this court hereby enjoins defendants Kenneth L. Salazar, in his official capacity as Secretary of the Interior, and Michael S. Black, in his official capacity as Acting Assistant Secretary for Indian Affairs of the United States Department of Interior, from transferring into trust on behalf of the United Keetoowah Band Corporation the 2.03-acre parcel that is the subject of this action on the merits pending resolution on the merits of this case. The injunction is effective immediately.

Anything further?

MR. MCMILLIN: Yes, Your Honor. We would ask that you agree to stay your injunction and your opinion pending appeal of this matter.

THE COURT: Well, that's problematic because if I were to stay it, technically the secretary could put the land into trust in two days.

Your thoughts?

MR. MCMILLIN: Well, my thoughts are, Your Honor, that I'm obligated to ask you to stay your hand.

THE COURT: Well, I understand. I think we

could craft this in such a way that the secretary would not place the property into trust.

Mr. McCullough, any thoughts? I mean, I do think the UKB -- if the UKB and the secretary -- excuse me -- can persuade the Tenth Circuit to lift the injunction, they ought to be afforded that right.

MR. MCCULLOUGH: I'm sorry, Your Honor.

THE COURT: Go ahead, sir.

MR. MCCULLOUGH: Well, there's certainly --

THE COURT: If you could approach -- both of you could approach the microphone.

MR. MCCULLOUGH: There's certainly the right -- as I'm sure we would all agree, there's the right to appeal. The problem here, Your Honor, is what the court has said. To stay, in essence, two days from now, the 14th, would allow the department to take the land into trust if there's no injunction pending, then the Nation has been denied the relief afforded under this injunction.

I believe that the -- even though the 14th is when the secretary said they would take the land into trust, I believe if you look at the agreed order the judge has referenced in the Eastern District case, they actually have until the 30th to seek relief from the Tenth Circuit. So they would have potentially a

couple weeks because they can continue gaming for that period of time.

THE COURT: If you all could figure this out to keep the secretary from placing the land into trust. I certainly appreciate your position and was thinking about how that could be done. I haven't figured out how that could be done. But certainly the secretary needs to be enjoined at this juncture from placing the land into trust, which is really only about 36 hours away.

MR. MCCULLOUGH: That's correct. That is correct, Your Honor. What they're asking is that essentially stay the issue and we be denied the relief granted us by the injunction.

THE COURT: All right. At this juncture, without being given a way to get that accomplished without lifting the injunction entirely, I'll respectfully deny the request. That's without prejudice. If you all -- and you all are considerably smarter than I am -- you all can put your heads together and see if there's a way to artfully put that together.

MR. MCMILLIN: Thank you, Your Honor.

THE COURT: Yes, sir. Anything further?

MR. HEMBREE: Nothing further from the

Cherokee Nation.

MR. KEGLOVITS: No, Your Honor.

MR. DODD: Nothing further.

THE COURT: Thank you very much. We're adjourned.

(The proceedings were concluded)

C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 12th day of August 2013.

s/ Brian P. Neil

Brian P. Neil, RMR-CRR
United States Court Reporter